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### The Interstate Commerce Objection: Stay Under CPLR 2201 May Best Serve Interests of Justice

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The court found that no one could have possibly served the Clerk of the Board of Assessors without knowing his personal identity, and thus, it appeared to be a "trap purposefully set for the unwary."<sup>64</sup> This finding was confirmed by the city's admission that it had delayed its motion until the thirty days in which the papers could have been served again had expired.<sup>65</sup>

The result in the instant case, however just, appears to hold valid, service by estoppel. Technically, service was defective even under CPLR 312, but it appears just and proper to dispense with formal requirements when to adhere thereto would result in substantial injustice.<sup>66</sup>

*The interstate commerce objection: A stay under CPLR 2201 may best serve interests of justice.*

The doctrine of forum non conveniens allows a court, in its discretion, to refuse to entertain jurisdiction in an action between non-residents upon a cause of action arising outside the state of New York. This doctrine as applied to corporations has been codified by Section 1314 of the New York Business Corporation Law [hereinafter referred to as BCL]. It appears that if a particular case comes within the ambit of section 1314(b)(1)-(4) the court must hear that case.<sup>67</sup> But where section 1314(b)(5) controls, the court may in its discretion refuse jurisdiction.<sup>68</sup> In the discretionary area courts generally will assume jurisdiction only where a special circumstance exists.<sup>69</sup> For example, if the statute of limitations would bar any remedy in another jurisdiction New York courts have found this to be a special circumstance.<sup>70</sup>

In the recent case of *Ceravit Corp. AG v. Black Diamond Steamship Corp.*,<sup>71</sup> a Swiss corporation sued a foreign corporation licensed to do business in New York for damage to cargo shipped from Philadelphia to Switzerland. In the particular transaction involved the defendant's ship had no contact with New York.

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<sup>64</sup> *Cale-Rome, Inc. v. Board of Assessors*, 44 Misc. 2d 675, 678, 255 N.Y.S.2d 12, 15 (Sup. Ct. 1964).

<sup>65</sup> N.Y. REAL PROP. TAX LAW § 702 provides that a proceeding to review a tax assessment must be commenced within thirty days after the fully completed assessment roll.

<sup>66</sup> Cf. *Avery v. O'Dwyer*, 201 Misc. 989, 110 N.Y.S.2d 569 (Sup. Ct.), modified on other grounds, 280 App. Div. 766, 113 N.Y.S.2d 686 (1st Dep't 1952), aff'd, 305 N.Y. 658, 112 N.E.2d 428 (1953).

<sup>67</sup> N.Y. BUS. CORP. LAW § 1314, comments.

<sup>68</sup> See, e.g., *Yesuvida v. Pennsylvania R.R.*, 200 Misc. 815, 111 N.Y.S. 2d 417 (Sup. Ct. 1951).

<sup>69</sup> *Id.* at 818, 111 N.Y.S.2d at 420.

<sup>70</sup> See, e.g., *Williamson v. Palmer*, 181 Misc. 610, 43 N.Y.S.2d 532 (Sup. Ct. 1943); *Randle v. Inecto, Inc.*, 131 Misc. 261, 226 N.Y. Supp. 686 (Sup. Ct. 1928).

<sup>71</sup> 44 Misc. 2d 484, 254 N.Y.S.2d 253 (Civ. Ct. 1964).

The defendant moved to dismiss on the ground that the court lacked subject matter jurisdiction.<sup>72</sup> Plaintiff opposed the motion on two grounds: (1) the statute of limitations would bar any remedy in Pennsylvania, and (2) no undue burden would be placed upon defendant which has its principal place of business in New York. In granting the motion to dismiss, the court held Section 1314(b) (5) of the BCL to be violative of the commerce clause<sup>73</sup> when applied to a cause of action in which defendant foreign corporation is a carrier engaged in interstate commerce; the transaction involved did not occur in New York; and the vessel had no contact with New York.

It should be observed that a "special circumstance" might well have been found in the instant case, *i.e.*, the statute of limitations had run in Pennsylvania. Therefore, if defendant had not raised the commerce objection, the court could have exercised its discretion and heard the case.

The commerce objection will lie where the exercise of jurisdiction by a state court over a foreign corporation would impose an unreasonable burden upon interstate commerce.<sup>74</sup> Conversely it will not lie where the "orderly and effective administration of justice [would require] the carrier to submit to suit"<sup>75</sup> in the forum state. Thus, in each case the court must carefully analyze the factual situation with particular emphasis on the defendant's contacts with the forum state.

In considering whether a trial on the merits is an unreasonable burden on interstate commerce, the courts apparently have a dual standard. A comparison of two leading cases leads one to the conclusion that where a common carrier is involved, the courts require a greater number of contacts with the forum than in the non-carrier situation.<sup>76</sup> Justification exists for such a requirement since a prospective suit in the forum state might necessitate a

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<sup>72</sup> CPLR 3211(a)(2). The commerce objection has been classified as subject matter jurisdiction in the *Baltimore Steamship* case, *infra* note 75. But since failure to raise the commerce objection may be deemed a waiver of it, one might argue that the commerce objection is not really subject matter jurisdiction, because subject matter jurisdiction cannot be waived. See *Meyers v. American Locomotive Co.*, 201 N.Y. 163, 94 N.E. 605 (1911).

<sup>73</sup> U.S. CONST. art. I, § 8.

<sup>74</sup> See *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1934), and cases cited therein.

<sup>75</sup> *Baltimore Mail S.S. Co. v. Fawcett*, 269 N.Y. 379, 199 N.E. 628 (1936).

<sup>76</sup> Compare *Baltimore Mail S.S. Co. v. Fawcett*, *supra* note 75, with *Banque De France v. Supreme Court*, 287 N.Y. 483, 41 N.E.2d 65, *cert. denied*, 316 U.S. 646 (1942). In the former case, the defendant-common carrier's contacts with New York were: (1) a bank account; and, (2) possibly, solicitation of freight or traffic. Jurisdiction was denied. In the latter case, the non-carrier French Bank's contacts with New York were: (1) the conduct of some business *incidental* to its business in France; and, (2) the maintenance of a bank account here. Jurisdiction was sustained.

deviation from the carrier's trade route and a return to New York. This constitutes an unreasonable burden on interstate commerce, since the carrier could easily be sued in ports along its trade route. However, in a non-carrier enterprise, a prospective suit in any forum will necessitate transportation of witnesses, parties and other evidence. Therefore, the courts will require fewer physical contacts with the forum state in a case involving a non-carrier.

Generally, in the carrier situation, where the ship involved never enters the forum state the courts will not entertain the suit.<sup>77</sup> The *Ceravit* case extends the general rule. There, the court found that the defendant's "ships regularly ply the waters of New York harbor. However, defendant's ship did not have any contact with New York harbor in the *transaction involved in this suit*."<sup>78</sup> (Emphasis added.) It appears, therefore, that the court has added the further restriction that the particular transaction sued upon must result from a contact with New York. It is submitted that the *Ceravit* case dealt a harsh blow to the plaintiff, whose remedy was barred elsewhere by the statute of limitations, but was not barred in New York. If the vessel involved were scheduled to put in at New York on a subsequent voyage, plaintiff might have proceeded as follows: by commencing the action against the carrier in New York; and then, opposing the commerce objection by a motion to stay the action pursuant to CPLR 2201 until the arrival of said vessel. Such motion would be made on the ground that if the stay were granted, the vessel and its crew (necessary to any trial) would not be required to deviate from the normal avenue of commerce. Thus, the essential ingredient for sustaining the commerce objection, *i.e.*, the unreasonable burden, would be eliminated.

A judge, following the liberal philosophy of procedure, could reason that Section 1314(b)(5) of the BCL allows the court, where a special circumstance exists, to hear the case if there is no constitutional objection. Such a judge would be justified in granting a stay and in hearing the case at a time when the commerce objection would not lie. An application of this rationale would seem to lead to a more just result since a plaintiff barred from recovery elsewhere by the statute of limitations would still be afforded a substantive remedy.

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<sup>77</sup> See, *e.g.*, *Baltimore Mail S.S. Co. v. Fawcett*, *supra* note 75.

<sup>78</sup> *Ceravit Corp. AG v. Black Diamond S.S. Corp.*, 44 Misc. 2d 484, 486, 254 N.Y.S.2d 253, 255 (Civ. Ct. 1964).